addition, within our discussions of specific network elements, we will also inject granularity into our analysis by considering types and capacities of facilities.[408] While some have argued that granularity can only harm competition by making it more difficult for competitors to use UNEs,[409] we find that additional granularity takes into account "the state of competitive impairment in [a] particular market,"[410] and adds the needed "balance" to our unbundling rules that the courts have required.[411] Indeed, doing a granular analysis permits us to distinguish situations for which there is impairment from those for which there is none.[412]

119. We disagree that we should conduct a different impairment analysis for independent incumbent LECs than for BOCs, or that we should formulate different triggers for relief from unbundling obligations for these carriers.[413] Sections 251(c)(3) and 251(d)(2) apply equally to all incumbent LECs, both independents and BOCs,[414] and Congress applied a different standard to BOCs than to independent incumbent LECs in other areas of the 1996 Act, such as section 271.[415] That being said it is possible that our more granular analysis will produce different results in some independent incumbent LEC territories to the extent they are more rural or less densely populated than other territories. However, many rural LECs still retain the exemption from section 251(c)(3) of the Act as required by section 251(f), and as such, will not

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Decl. at para. 18 (arguing for careful market definition); GCI Nov. 21, 2002 *Ex Parte* Letter, Attach. at 2; ITTA Jan. 27, 2003 *Ex Parte* Letter, Attach. at 1.

[408] Several commenters urged us to do so. *See, e.g.*, SBC Comments at 32-33.

[409] *See* AT&T Comments at 61-64. *See generally* Illinois Commission Comments at 5.

[410] *USTA*, 290 F.3d at 422.

[411] *Iowa Utils. Bd.*, 525 U.S. at 430 (Breyer, J., concurring); *USTA*, 290 F.3d at 427 (quoting *Iowa Utils. Bd.*, 525 U.S. at 429-30 (Breyer, J., concurring)).

[412] *See, e.g.*, ACS Reply at 4. This granularity may well result in different findings for urban versus rural markets. *See* ACS Jan. 16, 2003 *Ex Parte* Letter (urging Commission to take local Alaskan market conditions into account); ITTA Jan. 27, 2003 *Ex Parte* Letter, Attach. at 2-3 (arguing that the Commission should take the characteristics of independent incumbent LECs into account through a more granular analysis), 5-6 (finding support in section 251(f) for the proposition that Congress intended a market-specific impairment analysis, particularly for rural carriers). We do not in this Order address appropriate rules for state proceedings regarding the rural exemption of section 251(f). *Id.* at 5-6.

[413] *See generally, e.g.*, ACS Jan. 6, 2003 *Ex Parte* Letter; ITTA Jan. 27, 2003 *Ex Parte* Letter, Attach. at 3; ITTA Jan. 29, 2003 *Ex Parte* Letter, Attach.

[414] 47 U.S.C. § 251(c) ("[E]ach incumbent local exchange carrier has the following duties . . . ."); *id.* § 251(d)(2) ("In determining what network elements should be made available for purposes of subsection (c)(3) . . . .").

[415] *Id.* § 271(a) ("Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.").

be subject to those particular unbundling requirements until such time as the exemption is lifted.[416]

120. We disagree with commenters that section 251(c)(3)'s reference to "a telecommunications service" means that a granular analysis is unlawful because UNEs must be available for any telecommunications service.[417] As we discuss in more detail in Part V.B.2.c., this argument is no longer consistent with the D.C. Circuit's call for granularity or its affirmation of the Commission's previous service-by-service inquiry.

121. We also disagree with commenters that the only type of granular analysis that would enhance the unbundling rules must be so granular as to be administratively unworkable, and therefore that the Commission should not pursue any granularity at all.[418] Furthermore, commenters argue, any granularity will involve line-drawing that will yield imperfect results – underinclusiveness and overinclusiveness – and will lead to litigation and opportunities for incumbent LECs to interpret rules aggressively in their own favor.[419] We conclude, as explained below, that we can incorporate granularity in an administratively workable fashion that results in meaningful distinctions in our unbundling rules. We cannot analyze each of the countless pieces of equipment in the incumbent LECs' networks individually. As we have stated, the courts have not required such an extreme level of granularity and we find that approach, in any event, administratively infeasible. We recognize, too, that Congress expressed its preference for "deregulation," but we do not agree that a general call for deregulation throughout implementation of the many provisions of the 1996 Act must trump our duty to make the unbundling analysis of section 251 adhere as closely as possible to the *many* goals of the Act by declining to engage in a careful, granular analysis.[420]

122. We also disagree with commenters that argue that the definition of "network element" contained in section 153(29) precludes any unbundling distinctions based on the granularity factors we have determined to examine.[421] The D.C. Circuit has instructed us to

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[416] *Id.* § 251(f)(1), (2). Section 251(f)(1) involves a conditional exemption from section 251(c) for rural telephone companies, while section 251(f)(2) involves a right of rural carriers with fewer than 2% of the nation's subscriber lines to petition state commissions for suspension and modification of section 251(c) obligations. *Id.* § 251(f)(2).

[417] *See, e.g.*, ASCENT Comments at 28-30.

[418] *See* AT&T Comments at 98-99; CompTel Comments at 75-76; Sprint Reply at 23. *Cf.* ATTWS Comments at 7 (cautioning that too much granularity could make the Commission's rules too complicated and could increase market uncertainty); Dynegy Comments at 5; NewSouth Comments at 51; Qwest Comments at 16-17 (urging the Commission to adopt rules that are easy to administer and predictable); Allegiance Reply at 18, 26 (noting that a fully granular analysis is not possible).

[419] *See* AT&T Comments at 99-106; WorldCom Reply at 21; AT&T Willig Reply Decl. at para. 69. *See generally* NewSouth Comments at 55; SWCTA Comments at 16.

[420] *Cf.* Qwest Comments at 16.

[421] *See* CompTel Comments at 23.

perform a more granular analysis.[422] Moreover, it is up to the Commission to determine *which* network elements, as defined by the Commission, must be unbundled. Section 251(d)(2) does not direct us to unbundle all elements in all circumstances. Likewise, section 251(c)(3) does not prevent us from making more granular assessments of unbundling. Section 251(c)(3) indicates *where* network elements must be unbundled (after a section 251(d)(2) analysis results in an unbundling determination) and says nothing about the impairment finding that creates the unbundling obligations in the first instance.[423]

a. Customer Class Distinctions

123. In this Part, we distinguish broad classes of customers as the first step in introducing granularity into our analysis. We asked in the *Triennial Review NPRM* whether our analysis should consider the type of customer that a requesting carrier seeks to serve.[424] Subsequent to the *NPRM*, customer classes were specifically discussed as a relevant example of granularity in *USTA v. FCC*.[425] We find here that the economic characteristics of the mass market, small and medium enterprise, and large enterprise customer classes can be sufficiently different that they constitute major market segments. Much of our analysis in discussing the individual network elements will be organized around these classes, which may vary slightly from element to element because of the different economic considerations that surround the different elements.[426] These customer classes generally differ in the kinds of services they purchase,[427] the service quality they expect, the prices they are willing to pay, the levels of revenues they generate, and the costs of delivering them services of the desired quality. While our analysis will be performed on a granular level, we will only discuss those distinctions that could yield a difference in our finding of impairment. If different classes of customers have sufficiently similar economic characteristics such that we expect them to yield identical findings of impairment with regard to the network element in question, then we will analyze those classes together.

124. Based on the record before us, it is reasonable to distinguish these three classes of customers – mass market, small and medium enterprise, and large enterprise – for several reasons. These classes can differ significantly based on the services purchased, the costs of providing service, and the revenues generated. Because of these differences, for certain network

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[422] *USTA*, 290 F.3d at 415.

[423] *See Iowa Utils. Bd.*, 525 U.S. at 391.

[424] *Triennial Review NPRM*, 16 FCC Rcd at 22801-02, paras. 42-44.

[425] *USTA*, 290 F.3d at 422-26.

[426] Where it is appropriate, in our discussion of the individual network elements we will provide an even more granular analysis, examining whether impairment exists in the provision of different services, for different types of customers, located in different geographic areas.

[427] *See supra* Parts VI.A.4.b.(ii)(c) and VI.C.4.c.

elements the determination whether impairment exists may differ depending upon the customer class a competing carrier seeks to serve.

125. We reject the argument made by some commenters that distinguishing customers by customer class is either not required by the Act, nor administratively practicable.[428] As discussed earlier, a more granular analysis is required to determine whether competing carriers are impaired in providing the services they seek to provide.[429] Because carriers' impairment could vary by customer class, we are obligated to determine which customers could not be served by carriers without the UNEs in question, and, where practical, require unbundling only for those customers. We also find that distinguishing customers by class is administratively practical in our analysis for many of the network facilities. While we acknowledge that our analysis is limited by the administrative feasibility of performing a particular level of granular analysis, we find that distinguishing customers by class is both convenient and feasible, and increases the granularity of our analysis. It also allows us to examine more carefully whether competing carriers are able to serve small businesses, and determine the unbundling requirements needed to overcome competing carriers' impairment (if any) in serving these customers. We can thus ensure that our rules will bring the benefits of competition to small businesses.

126. We note that in previous orders, such as the *UNE Remand Order*, we found it appropriate to consider the customer classes a requesting carrier seeks to serve when considering whether to unbundle a network element.[430] Distinguishing customers by type is also consistent with our approach in merger orders, such as the *Bell Atlantic/NYNEX Merger Order*, the *SBC/Ameritech Merger Order*, and the *WorldCom/MCI Merger Order*.[431]

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[428] AT&T Comments at 97-100; CompTel Comments at 75; Covad Comments at 42; Georgia Commission Comments at 3-4; Illinois Commission Comments at 5; Sprint Comments at 14-17.

[429] *See supra* Part V.B.2.

[430] *UNE Remand Order*, 15 FCC Rcd at 3737, para. 81 ("[T]he type of customers that a competitive LEC seeks to serve is relevant to our analysis of whether the cost of self-provisioning or acquiring an element from a third-party supplier impairs the ability of a requesting carrier to provide the services it seeks to offer."). This approach was subsequently applied in the *Line Sharing Order*. *Line Sharing Order*, 14 FCC Rcd at 20929, paras. 31-32.

[431] *Application of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20016, para. 53 (1997) (*Bell Atlantic/NYNEX Merger Order*); *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14746, para. 68 (1999) (*SBC/Ameritech Merger Order*); *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18040-41, paras. 25-26 (1998) (*WorldCom/MCI Merger Order*). The approach in these merger orders follows that developed in the *LEC Classification Order*, which followed the 1992 Merger Guidelines. *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149, 96-61, Second Report in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15773-74, paras. 25-26 (*LEC Classification Order*); *WorldCom/MCI* (continued....)

127. Mass market customers consist of residential customers and very small business customers.[432] Mass market customers typically purchase ordinary switched voice service (Plain Old Telephone Service or POTS) and a few vertical features. Some customers also purchase additional lines and/or high speed data services. Although the cost of serving each customer is low relative to the other customer classes, the low levels of revenue that customers tend to generate create tight profit margins in serving them. The tight profit margins, and the price sensitivity of these customers, force service providers to keep per customer costs at a minimum. Profits in serving these customers are very sensitive to administrative, marketing, advertising, and customer care costs. These customers usually resist signing term contracts.

128. Small and medium enterprises are willing to pay higher prices for telecommunications services than the mass market. Indeed, they are often required to do so under business tariffs. Because their ability to do business may depend on their telecommunications networks, they are typically very sensitive to reliability and quality of service issues. These customers buy larger packages of services than do mass market customers, and are willing to sign term contracts. These packages may include POTS, data, call routing, and customized billing, among other services. Although serving these customers is more costly than mass market customers, the facts that enterprise customers generate higher revenues, and are more sensitive to the quality of service, generally allow for higher profit margins. The higher profit margins and greater emphasis on quality of service can provide a greater incentive to competing carriers to provision their own facilities, and the higher revenues make it easier to cover the fixed costs of installing such facilities.

129. Large enterprises demand extensive, sophisticated packages of services. Reliability of service is essential to these customers, and they often expect guarantees of service quality. The services they might purchase include an internal voice and data network, local, long distance, and international POTS service to one or multiple locations, provisioning and maintenance of a data network such as ATM, frame relay or X.25, and customized billing. The large revenues these customers generate, and their need for reliable service and specialized

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Merger Order, 13 FCC Rcd at 18040, para. 25. The *Bell Atlantic/NYNEX Merger Order* found three separate customer groups, consisting of residential and small business, medium–sized businesses, and large business and government. *Bell Atlantic/NYNEX Merger Order*, 12 FCC Rcd at 20016, para. 53. In the *WorldCom/MCI Merger Order, SBC/Ameritech Merger Order,* and *Bell Atlantic/GTE Merger Order*, the Commission distinguished mass market consumers from larger business customers in its analysis of the provisioning of local exchange and exchange access services. *WorldCom/MCI Merger Order*, 13 FCC Rcd at 18119, para. 164; *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14746, para. 68; *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control*, CC Docket No. 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032, 14088-89, para. 102 (*Bell Atlantic/GTE Merger Order*).

[432] Very small businesses typically purchase the same kinds of services as do residential customers, and are marketed to, and provided service and customer care, in a similar manner. Therefore, we will usually include very small businesses in the mass market for our analysis. We note, however, that there are some differences between very small businesses and residential customers. For example, very small businesses usually pay higher retail rates, and may be more likely to purchase additional services such as multiple lines, vertical features, data services, and yellow page listings. Therefore, we may include them with other enterprise customers, where it is appropriate in our analysis.

equipment to serve them, provide a large incentive to suppliers to build their own facilities where possible, and carry these customers' traffic over their own networks.

b. Geographic Granularity

130. In the *Triennial Review NPRM*, we sought comment on whether and how to reflect geographic differences in the application of our unbundling standard.[433] The *USTA* decision also found a need for a more granular analysis in general that takes "market-specific variations" into account.[434] As many commenters urge us to do, throughout our application of the analysis to specific elements we will consider whether impairment varies geographically throughout the country.[435] Indeed, several incumbent LECs urge this Commission to adopt an unbundling analysis that is far more granular than that of the *UNE Remand Order*.[436] Such an approach permits us to take the circumstances of rural carriers and the areas they serve into account.[437] In those instances where the record permits us to create unbundling rules that apply nationally – because the result would be the same as if we conducted a separate analysis of each geographic market – we agree with commenters that we should do so.[438] In other instances, we will create rules that will vary in their implementation in different areas of the country. Accordingly, in these circumstances, we may delegate authority to state commissions to ensure

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[433] *See Triennial Review NPRM*, 16 FCC Rcd at 22799-800, para. 39.

[434] *See USTA*, 290 F.3d at 422.

[435] *See, e.g.*, Alcatel Comments at 19-20; GCI Comments at 21; SBC Comments at 30-32; BOC Shelanski Decl. at para. 41; Verizon Reply at 35; Verizon Dec. 17, 2002 *Ex Parte* Letter, Attach. at 2-3.

We do not, however, evaluate in this proceeding whether states have set TELRIC prices at appropriate levels. *See, e.g.*, ACS Jan. 6, 2003 *Ex Parte* Letter (arguing that Alaska Commission has set UNE rates below cost). This proceeding is not the proper forum for such arguments, for which the Act has set up a separate review procedure in section 252(e)(6).

[436] *See* Qwest Reply at 26-27 ("[A] market specific analysis may be necessary to eliminate unbundling obligations in certain markets where it would be feasible for CLECs to obtain network elements from a non-ILEC source . . . . For example, . . . the increased deployment of CLEC transport facilities in certain markets justifies geographic specificity in the unbundling analysis for the dedicated transport network element."); SBC Reply at 67 ("[T]he Commission may not make UNEs available where competitors are already using or should be able to use alternatives to UNEs . . . . With respect to . . . elements [other than switching, transport, and high-capacity loops], it may be true in some areas but not yet in others. For those elements, the Commission *must* adopt a more granular analysis of when to order unbundling.") (emphasis in original); Verizon Reply at 35 ("[A] geographic-specific analysis is necessary, not to determine where CLECs are not impaired, but to identify those few remaining locations where they are impaired."); BellSouth NERA Reply Decl. at para. 136 ("To summarize, the geographic granularity sought by the Commission can be helpful for defining the market within which impairment analysis should be conducted.").

[437] *See, e.g.*, Eschelon Comments at 9 (noting that it services small business customers, which are often not located in downtown areas); Rural Independent Competitive Alliance Comments at 2-3; PACE Coalition Comments on Verizon Forbearance Petition at 6 (filed Sept. 3, 2002); NTCA Reply at 2-3 (arguing that rural areas cannot economically be served by several carriers).

[438] *See* SBC Comments at 32; Allegiance Reply at 4 (noting that the Commission can adopt a national market for some UNEs and disaggregated markets for others); Qwest Reply at 26; WorldCom Reply at 22-23.

that the unbundling rules are implemented on the most accurate level possible while still preserving administrative practicality.[439]

131. We disagree with commenters that urge us not to conduct any geographically-specific analysis or delegate any geographic analysis to the states because, for example, geographically-granular rules will raise the cost of advertising, eliminate the possibility of ubiquitous competitive service, or prove administratively unworkable.[440] In some cases, it is not possible for us to adopt nationally-applicable rules that adhere to the *USTA* court's call for additional granularity.[441] Indeed, where we do defer analysis to the states, we expect they will

[439] *Cf., e.g.*, ASCENT Comments at 32-33 (urging the Commission to permit the states to handle any location-specific analysis); BellSouth Comments at 23 (arguing that the Commission should use MSAs in all instances); California Commission Comments at 12-13 (noting geographic differences in competition); Covad Comments at 84 (noting that the Commission cannot likely do a geographically-specific analysis); Florida Commission Comments at 2-3; GCI Comments at 22-23 (urging caution in aggregating geographic areas); New York Department Comments at 5; NuVox Comments at 52 (urging the Commission to involve the states in any geographically-specific analysis); Qwest Comments at 16-17 (arguing that geographic markets smaller than MSAs are probably unworkable); Texas Commission Comments (urging strong role for states); UNE Platform Coalition Comments at 27-32 (urging Commission to permit states to have substantial role); Allegiance Reply at 4 (urging Commission to delegate loop and transport analysis to states), 25 (noting difficulties of generalizing markets); BellSouth Reply at 12 (urging use of MSA); Talk America Reply at 14-17 (arguing that only the states can make sufficiently granular rules); WorldCom Reply at 23-24; BellSouth NERA Reply Decl. at para. 125 (urging use of MSA); Covad Murray Reply Decl. at paras. 14-16 (noting that the Commission needs state help to do a geographically granular analysis); Letter from Russell M. Blau, Counsel for Lightship Telecom, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. at 1 (filed June 28, 2002) (Lightship June 28, 2002 *Ex Parte* Letter) (arguing that MSAs are too large for meaningful granularity); GCI Nov. 21, 2002 *Ex Parte* Letter, Attach. at 11-12.

Thus, even in those circumstances where the record contains substantial evidence regarding market conditions in some localities, the Commission may determine that state commissions are better poised to assess local impairment through hearings or other fact-finding procedures. *But see* ACS Jan. 16, 2003 *Ex Parte* Letter (urging Commission to make a finding of no impairment for Alaskan markets). We also do not address ACS's request for forbearance contained within a written *ex parte* presentation, as this is a rulemaking proceeding. Parties remain free to file petitions for forbearance that comply with our rules. 47 C.F.R. § 1.53.

Covad has pointed out that if we adopted the HMG as our "impair" standard, it would require us to define a geographic market for our analysis. *See* Covad Reply at 10; *see also* BellSouth NERA Reply Decl. at paras. 123-24 (noting that HMG could form basis of granular analysis). We take this lesson of geographic granularity from the HMG without adopting the HMG wholesale, as explained above. *See supra* Part V.B.1.d.(iii).

[440] *See, e.g.*, Sprint Comments at 5, 14-15; WorldCom Comments at 63; Mpower Reply at 17-18; AT&T Willig Reply Decl. at paras. 67-68 (arguing that a national unbundling list is "deregulatory" in the sense that it is simpler and leads to less regulatory involvement). *But see* BellSouth NERA Reply Decl. at para. 127 (noting that ubiquity and a granular analysis are not compatible).

[441] *But see, e.g.*, Arch Wireless Reply at 6, 11, 18 (arguing that paging and CMRS carriers need national unbundling rules).

achieve a much finer delineation of impairment from non-impairment than what we could do nationally.[442]

c. Service Considerations

132. In this Part, we describe how we will use a service-specific framework to analyze the circumstances under which competitors qualify for access to UNEs. We adopt an approach that is consistent with the goals of the 1996 Act because it obligates incumbent LECs to provide access to UNEs only when requesting carriers seek to use those elements to compete against those services that traditionally have been the exclusive domain of incumbent LECs. As we explain below, Congress created the section 251 unbundling regime to foster competition in the incumbent LECs' core markets. Moreover, we set forth an approach that is consistent with the guidance we have received from the D.C. Circuit in the *USTA* and *CompTel* decisions.[443]

133. Under the approach we adopt today, a requesting carrier may access UNEs for the purpose of providing "qualifying services," as we define them below. Once a requesting carrier satisfies this condition, we reaffirm the Commission's existing rules that permit the carrier to use a UNE to provide additional services including non-qualifying telecommunications services and information services.[444] We reiterate that requesting carriers must be telecommunications carriers that seek to use the UNE to provide common carrier services, rather than private carrier services.

(i) Legal Background and Authority

134. Section 251(d)(2) sets forth the standard by which the Commission is to determine what network elements should be unbundled. Congress directed the Commission to consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the *services* that it seeks to offer."[445] In

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[442] Likewise, we do not agree that we must unbundle everywhere so that requesting carriers can enter "ubiquitously," and that requiring unbundling in locations where there is no impairment will do no harm. *See, e.g.*, Sprint Comments at 15-16; SWCTA Comments at 16-17. *But see* BellSouth Comments at 26; Qwest Comments at 13; Verizon Reply at 37-39, 47; BOC Shelanski Decl. at para. 4. Because unbundling has costs as well as benefits, we determine to unbundle elements only where they meet our "impair" standard. *See USTA*, 290 F.3d at 422; *see also, e.g.*, SBC Reply at 22-23, 33. *But see, e.g.*, WorldCom Comments at 49 (noting that competitive LECs cannot build a totally ubiquitous network); AT&T Reply at 55 (noting that inability to provide service ubiquitously contributes to impairment by limiting the number of customers over which overhead costs can be spread); Talk America Reply at 6, 36 (arguing that competitive LECs will prefer to use their own facilities when possible).

[443] *See USTA*, 290 F.3d at 422-30; *CompTel*, 309 F.3d at 12-16.

[444] In Part VII.B. below, we describe that, with respect to high-capacity facilities over which several types of services may be provided (*i.e.*, local, long distance, or Internet access), we determine that certain eligibility requirements must be satisfied to ensure that these facilities are being used for a qualifying service.

[445] 47 U.S.C. § 251(d)(2)(B) (emphasis added). The statute also requires the Commission to consider whether "access to such network elements as are proprietary in nature is necessary." 47 U.S.C. § 251(d)(2)(A). That prong of section 251(d)(2) does not include a reference to the "services that [the requesting carrier] seeks to offer." However, the same rationale applies to proprietary network elements as to non-proprietary network elements with respect to Congress's intent regarding when network elements would be available for requesting carriers. In fact, (continued....)

earlier orders, the Commission generally approached the unbundling analysis with regard to all telecommunications services, rather than the specific types of services a requesting carrier sought to provide over an element.[446] More recently, the Commission began to take the service provided by a requesting carrier into account, but did not do so in a comprehensive and consistent fashion.[447] Instead of adopting an overall framework applicable to all UNEs, the Commission focused only on how the UNE was being used in the context of specific elements. In this Order, although we decline to adopt a service-by-service impairment framework, we conclude that only requesting carriers providing certain qualifying services are entitled to UNEs.

(ii) Qualifying Services

135. We find that, in order to gain access to UNEs, carriers must provide qualifying services using the UNE to which they seek access. By "qualifying," we mean those telecommunications services offered by requesting carriers in competition with those telecommunications services that have been traditionally the exclusive or primary domain of incumbent LECs. They include, for example, local exchange service, such as POTS, and access services, such as xDSL and high-capacity circuits.[448]

136. In determining which types of service qualify for UNEs, we first look to the text of the 1996 Act. Because the text of the Act does not provide unambiguous direction, we consider the structure and history of the relevant portions of the Act, including its stated purposes, and interpret the statute to reach a reasonable conclusion regarding Congress's intent. Ultimately, we rely upon the purposes of the Act to support the interpretation that a permissible use of a network element must include a qualifying component.

137. First, we note that section 251(d)(2)'s reference to the "services that [the carrier] seeks to offer" is ambiguous as to the question of which services we should analyze in the

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Congress intended a higher standard – when access to the element is necessary, not just when a carrier is impaired without access to the element – to govern the availability of proprietary network elements. Therefore, there is no reason to differentiate between proprietary and non-proprietary network elements with respect to the services for which they can be used. In any event, we do not analyze any proprietary elements in this Order, so consideration of which services will be provided using those UNEs is not necessary.

[446] *UNE Remand*, 15 FCC Rcd at 3911-12, para. 484; *Local Competition Order*, 11 FCC Rcd at 15671-72, para. 356.

[447] *See, e.g., Supplemental Order Clarification* 15 FCC Rcd at 9598, para. 21 (usage restrictions applied to only EELs, not all UNEs). In the *Triennial Review NPRM*, the Commission sought comment on whether the unbundling analysis should be applied to specific services. *Triennial Review NPRM*, 16 FCC Rcd at 22798-99, para. 36. In a Public Notice issued following the *Supplemental Order Clarification*, the Commission also requested comment on whether it should undertake to conduct its impairment analysis on a service-by-service or market-by-market basis, and if so, how. *Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Service*, CC Docket No. 96-98, Public Notice, DA 01-169 (rel. Jan. 24, 2001) (*Exchange Access Public Notice*). The Commission also asked whether the service-specific approach should be applied to all aspects of the section 251(d)(2) analysis or just the "impairment" prong. *Triennial Review NPRM*, 16 FCC Rcd at 22798-99, para. 36.

[448] These services must be offered on a common carrier basis, as explained below.

context of our impairment analysis.[449] Despite prior interpretations to the contrary, in the *Supplemental Order Clarification* the Commission concluded that this language was indeed ambiguous, and determined to examine section 251(d)(2)'s reference to "services" as part of the impairment analysis.[450] In the context of considering whether requesting carriers could lease UNEs *solely* to provide exchange access or long distance services,[451] the Commission noted that section 251(d)(2)'s "services" language likely would limit the conversion of special access to combinations of loop and transport UNEs:

> [Section 251(d)(2)] asks whether denial of access to network elements "would impair the ability of the telecommunications carrier seeking access to provide *the services that it seeks to offer*." Although ambiguous, that language is reasonably construed to mean that we may consider the markets in which a competitor "seeks to offer" services and, at an appropriate level of generality, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services.[452]

138. We agree with the conclusion that the term "services" in section 251(d)(2) is ambiguous. Although Congress may have intended "services" in section 251(d)(2) to mean "telecommunications services" as used in section 251(c)(3), even this interpretation does not necessarily resolve the ambiguity concerning the scope of the section 251(d)(2) inquiry. While "telecommunications services" is more specific than "services," and thus limits the inquiry somewhat, we are still left to question which "telecommunications services" should be subject to the unbundling analysis.[453] Some parties have argued that section 251(d)(2) requires the Commission to analyze every telecommunications service using the impairment standard, and, that such a review would result in the unavailability of UNEs for most services except possibly local voice services.[454] Yet other parties argue that the Commission should not consider the

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[449] *Supplemental Order Clarification*, 15 FCC Rcd at 9595, para. 15; *USTA*, 290 F.3d at 422.

[450] *Supplemental Order Clarification*, 15 FCC Rcd at 9596, para. 15.

[451] *CompTel*, 309 F.3d at 11, 14.

[452] *Supplemental Order Clarification*, 15 FCC Rcd at 9595, para. 15 (footnotes omitted) (emphasis in original). Although the Commission in the *Supplemental Order Clarification* generally referred to use of a UNE in the provision of exchange access services, special access services, or long distance services, it is clear that the Commission was concerned about use of a UNE without appropriate consideration under the impair standard for how the UNE was to be used. *Supplemental Order Clarification*, 15 FCC Rcd at 9595-96, 9602, paras. 15-16, 28. Later in this Part, we specifically distinguish between the provision of exchange access services as part of a retail long distance service and the wholesale provision of exchange access services in competition with the incumbent LEC's special access services. As a result, issues raised in the *Exchange Access Public Notice* are either no longer relevant or resolved in this Order.

[453] 47 U.S.C. § 251(c)(3) *(emphasis added)*.

[454] Under these commenters' proposed analysis, requesting carriers would not be impaired without UNEs for those services for which sufficient retail competition exists. BellSouth Comments at 30-31, 34; SBC Comments at 21 (continued....)

particular services that a carrier seeks to offer at all, provided it seeks to offer a telecommunications service.[455] On this point, the D.C. Circuit observed that "[b]y referring to the 'services that [the requesting carrier] seeks to offer,' [Congress] seems to invite an inquiry that is specific to *particular* carriers and services."[456] Thus, we conclude that the language of section 251(d)(2) is ambiguous concerning the scope of the impairment inquiry.

139. An examination of the purposes behind the Act provides us with guidance as to the scope of section 251(d)(2). In passing the 1996 Act, Congress substantially changed many aspects of federal regulation of telecommunications services by establishing a "pro-competitive, de-regulatory national policy framework" designed to benefit all Americans "by opening all telecommunications markets to competition."[457] As its preamble notes, the Act was designed "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid development of new telecommunications technologies."[458] In particular, section 251's role in this regulatory scheme involves opening local markets to competition.[459] Indeed, Congress recognized that "it is unlikely that competitors will have a fully redundant network in place when they initially offer

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("[P]rior to ordering unbundling, the Commission must carefully scrutinize the service market in which the carrier that seeks to purchase the UNE intends to provide service. And, if 'the very concept of impairment' is to be 'intelligible,' it cannot permit unbundling where the service at issue is competitive."); Verizon Comments at 39-40.

[455] *See, e.g.*, ASCENT Comments at 28-29 ("Section 251(c)(3), accordingly, requires application of the unbundling analysis on a functionality-by-functionality basis, not on a service-by-service, or customer-by-customer, or carrier-by-carrier basis."); ATTWS Comments at 17 (arguing that a service-specific analysis would violate the plain language of the Act); California Commission Comments at 14; CompTel Comments at 52-54 (arguing that when a competitor buys a UNE, it pays for the entire functionality; a usage limitation would diminish the UNE's value); Illinois Commission Comments at 5; Maine CLEC Coalition at 6-7; Missouri Commission Comments at 8; NewSouth Comments at 52; Norlight Comments at 10; NuVox Comments at 45. We deny, in part, the petition for reconsideration filed by CompTel requesting that the Commission reconsider its decision to allow use restrictions for the reasons we explain in this section. Competitive Telecommunications Association Petition for Reconsideration, CC Docket No. 96-98 (filed Feb. 17, 2000) (CompTel Feb. 17, 2000 Petition for Reconsideration).

[456] *CompTel*, 309 F.3d at 12-13 (emphasis added).

[457] Joint Conference Report at 1.

[458] Preamble to the 1996 Act.

[459] *Id.*; *see also Local Competition Order*, 11 FCC Rcd at 15506, para. 4 ("Competition in local exchange and exchange access markets is desirable, not only because of the social and economic benefits competition will bring to consumers of *local* services, but also because competition eventually will eliminate the ability of an incumbent local exchange carrier to use its control of bottleneck local facilities to impede free market competition."). *See, e.g.*, Letter from Herschel L. Abbott Jr., Vice President – Government Affairs, BellSouth, to Michael K. Powell, Chairman, FCC, CC Docket No. 01-338 at 2, *in* Letter from Jonathan Banks, General Attorney, BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 2 (filed Dec. 19, 2002) (BellSouth Dec. 19, 2002 *Ex Parte* Letter) (stating that Congress intended the Act "to provide competitive alternatives for basic wireline local exchange service."); HTBC Comments at 41 ("Section 251 was intended to promote competition in a voice telephony market when [incumbent LECs] have market power and where no competitive alternatives to [incumbent LECs'] networks existed . . .").

local service . . . [and] some facilities capabilities (*e.g.*, central office switching) will likely need to be obtained from the incumbent local exchange carrier as network elements pursuant to new section 251."[460] As the Commission noted in the *Local Competition Order*, under the 1996 Act, "the opening of one of the last monopoly bottleneck strongholds in telecommunications – the local exchange and exchange access markets – to competition is intended to pave the way for enhanced competition in all telecommunications markets, by allowing all providers to enter all markets."[461] We find that a reasonable interpretation of the statute is that our impairment inquiry should center on those telecommunications services that competitors provide in direct competition with the incumbent LECs' core services, which we call "qualifying services."[462]

140. As stated above, by "qualifying services," we mean those telecommunications services offered by requesting carriers in competition with those telecommunications services that have been traditionally within the exclusive or primary domain of incumbent LECs.[463] These services, whether they are sold to residential or business customers, include, for example, local exchange services, such as POTS and local data service[464], and access services, such as xDSL[465]

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[460] Joint Conference Report at 148 (emphasis added).

[461] *Local Competition Order*, 11 FCC Rcd at 15506, para. 4.

[462] *See* Letter from John J. Heitmann, Counsel for NuVox, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 3 (filed Jan. 15, 2003) (NuVox Jan. 15, 2003 *Ex Parte* Letter) (referencing the type of services it provides indicates NuVox "intends to and does compete with the Bells and other ILECs head on in the provision of LEC services.").

[463] Our determination in this Part moots the issues the Commission raised in the *Shared Transport Order*. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460, 12494-96, paras. 60-61 (1997) (*Shared Transport Order*) *aff'd, Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 597 (8th Cir. 1998) (affirming the Commission's decision that shared transport is a network element regardless of the fact that shared transport can be used only when combined with switching), *vacated, Ameritech Corp. v. FCC*, 526 U.S. 1142 (1999), *aff'd in part on reh'g, Southwestern Bell Telephone Co.*, 199 F.3d 996 (8th Cir. 1999) (reissuing its affirmation of the Commission's determination that shared transport is a network element but vacating and remanding for further consideration the issue of whether shared transport must be made available on an unbundled basis).

[464] Letter from John J. Heitmann, Counsel for NuVox, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 2 (filed Jan. 23, 2003) (NuVox Jan. 23, 2003 *Ex Parte* Letter) (noting that a point-to-point local service comprises "data transmission between two points within a designated local calling area.").

[465] Although the D.C. Circuit vacated the Commission's conclusion that xDSL service is a "telephone exchange service" or "exchange access service," as defined in the Act, these services are currently regulated as "access services" as defined by the Commission's rules. *WorldCom v. FCC*, 246 F.3d 690 (D.C. Cir. 2001); *see also GTE Telephone Operating Cos., GTOC Tariff No. 1, GTE Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466 (1998). For example, some carriers file access tariffs containing certain types of xDSL services, such as ADSL and SDSL. *See, e.g.*, National Exchange Carrier Association Tariff FCC No. 5, § 8; Sprint Local Telephone Co. Tariff FCC No. 3, § 8.5; Roseville Tariff FCC No. 1, § 9.1. We note that commenters, including incumbent LECs, do not dispute that xDSL service is appropriately considered in our section 251 impairment analysis. BellSouth Comments 36-44; HTBC Comments at 40-42; SBC Comments at 22-23 (arguing that, under the impairment analysis, carriers should not receive access to UNEs for xDSL-based broadband services). *But see* Qwest Comments at 42 (noting that some "new network facilities" that can be used to provide (continued....)

and high-capacity circuits.[466] Parties have asked us to clarify whether CMRS would qualify for the use of a UNE.[467] We find that because CMRS are used to compete against telecommunications services that have been traditionally within the exclusive or primary domain of incumbent LECs services, CMRS providers also qualify for access to UNEs, subject to the limitations described herein.[468]

141. We find that our interpretation of sections 251(c)(3) and 251(d)(2) is the most reasonable because it ensures that the powerful regulatory tools made available through those provisions are focused on opening the bottleneck markets largely controlled by incumbent LECs. Given that unbundling is one of the most intrusive forms of economic regulation – and one of the most difficult to administer – it is unlikely that Congress intended to apply unbundling more generally absent an unambiguous mandate. Although we recognize that the Act's general purpose is to open all telecommunications markets to competition, section 251 of the Act is designed to achieve that goal in markets for local exchange services. Therefore, we believe it is more appropriate to interpret section 251(c) and (d) as applying to only those services that compete directly against traditional incumbent LEC services.

142. We disagree with those commenters that argue that section 251(d)(2) compels us to conduct an analysis of every possible service that a requesting carrier might want to offer.[469] Because section 251(d)(2)'s edict is far from clear, the Commission can use its discretion to

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xDSL "fall outside the scope of the market-opening objectives of section 251."); Verizon Comments at 71; Letter from William P. Barr, Executive Vice President and General Counsel, Verizon, to Michael K. Powell, Chairman, FCC, CC Docket No. 01-338 at 5, *in* Letter from Ann D. Berkowitz, Project Manager – Federal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 (filed Nov. 22, 2002) (Verizon Nov. 22, 2002 *Ex Parte* Letter).

[466] These services must be offered on a common carrier basis, as explained below. Our list is intended to identify general categories of services that would qualify as eligible services. It is not intended to be an exhaustive list or to identify services in a more particular manner. Rather, we believe this list should provide adequate guidance for parties to determine whether a service qualifies or not. *See* NuVox Comments at 55-56. In contrast, "non-qualifying" are those services not traditionally provided exclusively by incumbent LECs. Among others, they would include long distance voice services and data services provided on an interexchange basis.

[467] ATTWS Comments at 23-24; CTIA Comments at 3-7; Nextel Comments at 2; *see also* ATTWS and VoiceStream Petition for Declaratory Ruling, CC Docket No. 96-98 at 5-6 (filed Nov. 19, 2001) (ATTWS/VoiceStream Nov. 19, 2001 Petition); *Triennial Review NPRM*, 16 FCC Rcd at 22809-10, para. 63. On the other hand, some commenters argue that wireless providers should not be able to obtain access to UNEs. *See* BellSouth Comments at 46-53; SBC Comments at 24.

[468] We grant the portion of the ATTWS/VoiceStream Nov. 19, 2001 Petition requesting that the Commission declare that CMRS providers are entitled to access to UNEs, as long as the CMRS provider meets the requirements outlined throughout this Order. ATTWS/VoiceStream Nov. 19, 2001 Petition at 6; *see also* Progress Telecom Comments at 6 ("Nothing in the Communications Act . . . even remotely suggests that a requesting carrier must use the standalone UNEs for the provision of *wireline* services in order to obtain them from the incumbent LECs.").

[469] SBC Reply at 61-67.

reasonably interpret the statute.[470] Only if the statute were unambiguous would the Commission be compelled to undertake such an analysis as suggested by commenters.

143. *Use of UNEs for Non-Qualifying Services.* In the *Triennial Review NPRM*, the Commission sought comment on whether, if a network element is unbundled for one service, its availability should be limited to that service or whether requesting carriers should be able to use it for any service.[471] We conclude that, once a requesting carrier has obtained access to a UNE to provide a qualifying service, as defined above, the carrier may use that UNE to provide any additional services, including non-qualifying telecommunications and information services. This approach to the use of the network element, which maximizes the use of a network element once an unbundling decision has been made, is most consistent with the concerns raised by the *USTA* court regarding the "costs" associated with unbundling in the first instance.[472] In other words, once the Commission has determined to impose "the costs associated with mandatory unbundling" upon an incumbent LEC, it would be wasteful for the network element not to be put to its maximum use.

144. As discussed above, a requesting carrier must use a network element to provide a qualifying service in order to obtain unbundled access to that network element.[473] Section 251(c)(3) requires that incumbent LECs must provide UNEs to requesting carriers "for the provision of a telecommunications service."[474] Even if we presume that Congress may have intended "services" in section 251(d)(2) to mean "telecommunications services" as used in section 251(c)(3), as we noted above, this interpretation does not necessarily resolve the ambiguity regarding whether mixed use of UNEs is permissible. However, a reasonable interpretation of the Act, and an examination of its purposes, leads us to the conclusion that, when a UNE can be used to provide multiple services, Congress did not intend to require that UNEs be used exclusively to provide qualifying telecommunications services.

145. We note that section 51.100(b) of the Commission's current rules allows mixed use of UNEs.[475] We reaffirm this rule here. Moreover, the Commission's EELs rules were affirmed by the D.C. Circuit, and those rules permit a variety of services to be provided over this combination of network elements so long as a "significant amount of local exchange service" is also provided.[476] Generally, commenters do not contest these rules; instead, they debate how

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[470] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

[471] *Triennial Review NPRM*, 16 FCC Rcd at 22799, para. 38.

[472] *USTA*, 290 F.3d at 429.

[473] These services also must be offered on a common carrier basis, as explained below.

[474] 47 U.S.C. § 251(c)(3).

[475] 47 C.F.R. § 51.100(b) ("A telecommunications carrier that has interconnection or gained access under sections 251(a), 251(c)(2), or 251(c)(3) of the Act, may offer information services through the same arrangement, so long as it is offering telecommunications services through the same arrangement as well.").

[476] *CompTel*, 309 F.3d at 12-18.

much local service should be required and what conditions should be placed upon that usage (*e.g.*, a collocation requirement).[477] We ensure below, through our impairment analysis and related eligibility requirements, that our decision permitting the use of UNEs for services other than qualifying services does not lead to the "gaming" of our rules. Those issues will be addressed later in this Order within the impairment analysis for each particular UNE.

146. Allowing requesting carriers to use UNEs to provide multiple services on the condition that they are also used to provide qualifying services will permit carriers to create a package of local, long distance, international, information, and other services tailored to the customer. Offering packages of services in one integrated offering is a marketing method increasingly utilized by incumbent LECs to sell end users their array of available services.[478] The record shows that carriers must have sufficient flexibility in how they package service offerings to customers in order to be able to fully participate in the telecommunications market.[479] Limiting competitive LECs' use of UNEs to qualifying services only would likely affect their ability to meaningfully compete against incumbent LECs.[480] Moreover, such an interpretation would hamper a competitive LEC's ability to provide innovative service packages to customers, a result that would directly undermine the Act's explicit goal of encouraging innovation.[481] As the Commission stated in the *Local Competition Order*, Congress intended the opening of local markets "to pave the way for enhanced competition in *all* telecommunications markets, by

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[477] *See, e.g.*, Letter from Cronan O'Connell, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 1 (filed Dec. 19, 2002) (Qwest Dec. 19, 2002 EELs *Ex Parte* Letter) (proposing mixed use as long as 51% of traffic is local voice).

[478] Illinois Commission Comments at 3; Verizon Reply, Attach. B, Reply Declaration of Alfred E. Kahn and Timothy J. Tardiff (Verizon Kahn/Tardiff Decl.) at para. 39 (stating that Verizon has "long agreed with [AT&T's] position that carriers need to offer packages of services if they are to compete successfully.").

[479] CompTel Comments at 55-56; Illinois Commission Comments at 3; LDMI Comments at 17; NewSouth Communications Comments at 54-55; NuVox Comments at 56.

[480] We note that SBC has argued specifically that requesting carriers should not be allowed to use shared transport for intraLATA toll traffic. SBC Comments at 81-84; SBC Reply at 141-42; *But see* ALTS *et al.* Reply at 94-96 (responding in opposition to SBC on this point). SBC notes that some competing carriers that have purchased the shared transport UNE to provide local exchange service have asserted that they should be permitted to use it for intraLATA toll service as well. SBC Comments at 81 (citing a formal complaint, *CoreComm Communications, Inc. and Z-Tel Communications, Inc. v. SBC Communications, Inc. et al.*, EB-01-MD-017 (Aug. 28, 2001)). As we have previously indicated, the ability to compete in offering intraLATA toll services affects a competing LEC's ability to compete in the local market. *See SBC Communications Inc. Apparent Liability for Forfeiture*, File No. EB-01-IH-0030, Forfeiture Order, 17 FCC Rcd 19923, 19931-32, para. 15 (2002) (citing *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20738-40, paras. 377-78 (1997)). Under our decision here, once a requesting carrier gains access to the shared transport UNE to provide local service, the requesting carrier may also use it to provide *any* additional services, regardless whether those services are qualifying or non-qualifying. Accordingly, in light of the discussion above, we reject SBC's argument.

[481] Preamble to the 1996 Act; *see also* 47 U.S.C. § 157 nt ("The Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.").

allowing all providers to enter all markets."[482] To limit competitors' use of UNEs to *only* qualifying services would force requesting carriers to either continue to provide services on a stand-alone basis, contrary to the market trend, or even more perversely, to provide a package of services over duplicative networks or through duplicative network configurations.[483] Either result would effectively preclude a competitor's ability to compete in the market, especially in a market in which the market leader – the incumbent LEC – is not similarly constrained.

147. Allowing the use of UNEs in this manner is similar to the approach the Commission adopted in its *Collocation Remand Order* for multi-functional equipment.[484] In that Order, the Commission required incumbent LECs to allow the collocation of competitive LEC equipment that contained functions that would not meet the standard as stand-alone functions, recognizing that "allowing the collocation of multi-functional equipment is critical to the realization of Congress's goal of promoting competition and technical innovation."[485] The Commission acknowledged that competitive LECs must be able to realize the same productivity increases that developments in new technologies offer.[486] For these reasons, the Commission found that as long as the primary function satisfies the requisite collocation test, the other functions are also permitted.[487] Here, we follow a similar rationale. Our approach ensures that a UNE is used for appropriate purposes but also recognizes that the market and end users may benefit from the use of the UNE to provide additional services. Furthermore, as a practical matter, if we did not allow carriers to use UNEs to provide services in addition to qualifying services, we would effectively limit a requesting carrier's ability to use innovative multi-functional collocation equipment. Carriers would be able to collocate multi-functional equipment, as allowed by the *Collocation Remand Order*, but, under a rule restricting the use of UNEs, would be unable to use of all of the equipment's permitted functions.[488]

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[482] *Local Competition Order*, 11 FCC Rcd at 15506, para. 4.

[483] The same analysis applies in this context as in the commingling context. AT&T claims that the commingling ban creates a competitive barrier because it effectively requires competitive LECs to establish two parallel networks – one for local traffic and one for access traffic. AT&T Reply at 293. Furthermore, while it is theoretically possible to require a regime of differentiated pricing under which qualifying traffic would be priced at TELRIC and other traffic would be priced at market rates, such a regime would require undue policing of customer usage and would be administratively impractical and burdensome.

[484] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, CC Docket No. 98-147, 16 FCC Rcd 15435, 15454, para. 36 (2001) (*Collocation Remand Order*), *aff'd sub. nom. Verizon Telephone Cos. v. FCC*, 292 F.3d 903 (D.C. Cir. 2002).

[485] *Collocation Remand Order*, 16 FCC Rcd at 15453, para. 33.

[486] *Id.*

[487] *Id.* at 15454, para. 36. The Commission placed certain physical restrictions of the equipment allowed for other functions. *Id.*

[488] CompTel Comments at 55-56.

148. We disagree with commenters that state that the Act prohibits the use of UNEs for information services.[489] Section 251(c)(3) states that incumbent LECs have a duty "to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis."[490] The statute does not require that access be provided *exclusively* for telecommunications services. We note, in fact, that this statutory interpretation is consistent with Congress's intent to open existing markets served by incumbent LECs to competitive entry. As the foregoing discussion explains,[491] competitive LECs are providing integrated telecommunications and information service offerings in direct competition with the incumbent LEC provision of these services.[492] Moreover, such a rule may prohibit the packaging of services that would be considered advanced telecommunications capabilities, but are not telecommunications services themselves, thus conflicting with the goals of the Act.[493] We reasonably infer that a competitor may use a UNE to provide a broader category of services, provided that the competitor is, in fact, also providing qualifying service over the UNE.[494]

149. *Requesting carriers must offer a service on a common carrier basis.* Finally, we affirm that, in order to gain access to a UNE under section 251(c)(3), a requesting carrier must provide a "telecommunications service," and specifically a qualifying telecommunications service, over that UNE.[495] It cannot, for example, qualify for UNEs to the extent it provides exclusively private carrier services or information services.[496] Section 251(c)(3) uses the term "telecommunications service" and both sections 251(c)(3) and (d)(2) use the term "telecommunications carrier" to define the scope of the unbundling obligation.[497]

150. The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used,"[498] and defines "telecommunications carrier" as "any provider of telecommunications services."[499] The

[489] Next Level Comments at 13 n.26; SBC Comments at 22; Verizon Comments at 71-81; SBC Reply at 88-112.

[490] 47 U.S.C. § 251(c)(3).

[491] *See* Part IV.B.1.

[492] *See* NuVox Jan. 15, 2003 *Ex Parte* Letter at 3.

[493] *See* 47 U.S.C. § 157 nt ("The Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.").

[494] This issue is discussed further in Part VII.B.

[495] 47 U.S.C. § 251(c)(3).

[496] This issue is discussed further in Part VII.B.

[497] 47 U.S.C. §§ 251(c)(3) and (d)(2).

[498] *Id.* § 153(46).

[499] *Id.* § 153(44).

Commission has interpreted "telecommunications services" to mean services offered on a common carrier basis, and the D.C. Circuit has affirmed that interpretation.[500] Thus, to obtain access to a UNE, a requesting carrier must use the UNE to provide at least some services on a common, rather than private, carriage basis. We note that this provision of the Act is not ambiguous. Thus, Congress's use of "telecommunications service" in section 251(c)(3) has a clear meaning defined by the Act.

151. We find that the Act evokes an implicit tradeoff. In exchange for obtaining UNEs, a requesting carrier must not only provide services that compete head-to-head against the incumbent LEC, but must do so on a basis that ensures that the benefits of competition accrue to the general public. We find that it is reasonable to interpret the Act in a manner that ensures the availability of UNEs is not boundless and is appropriately limited to the furtherance of clear statutory purposes.[501]

152. Generally stated, a common carrier holds itself out to provide service on a non-discriminatory basis.[502] A private carrier, on the other hand, decides for itself with whom and on what terms to deal.[503] Common carrier status has been assessed by the Commission and the courts by the application of the two-part *NARUC* test: (1) whether the carrier "holds himself out to serve indifferently all potential users"; and (2) whether the carrier allows customers to "transmit intelligence of their own design and choosing."[504]

153. Common carrier services may be offered on a retail or wholesale basis because common carrier status turns not on *who* the carrier serves, but on *how* the carrier serves its customers, *i.e.*, indifferently and to all potential users. For example, residential local voice services typically are both retail services and common carrier services because they are sold to end users through generally available offerings. Carriers that offer residential local voice services do not generally make individualized decisions whether and on what terms to deal with

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[500] *See AT&T Submarine Systems, Inc.*, File No. S-C-L-94-006, 11 FCC Rcd 14885 (1996) (*AT&T Submarine Systems*), *appl. for rev. denied*, *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585 (1998), *aff'd sub nom. Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999).

[501] It is also fundamentally fair that carriers that choose to escape some of the regulation necessary to become a common carrier do not have the same benefits available to those carriers that do bear those burdens.

[502] *See AT&T Submarine Systems*, 11 FCC Rcd at 14885; *see also* 47 U.S.C. § 153(10) ("The term 'common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio . . . .").

[503] *See Southwestern Bell Telephone v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) ("If the carrier chooses its clients on an individual basis and determines in each particular case 'whether and on what terms to serve' and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a common carrier" citing *National Ass'n. of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608-09 (1976) (*NARUC II*); *National Ass'n of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 643 (1976) (*NARUC I*)).

[504] *NARUC II*, 533 F.2d at 608-09. Commission and court precedent provides guidance as to the characteristics of common carrier services. *Id.; NARUC I*, 525 F.2d at 644.

their customers. Likewise, although access services are wholesale offerings when sold to other carriers, they also are common carrier services when offered indifferently to all members of a particular class of customers. For example, if a carrier tariffed an access offering and made it available to other carriers as an input for their retail interexchange service, such access service would be a common carrier service. In contrast, the self-provision of access services used solely as an input to provide a retail interexchange service does not qualify as the provision of exchange access on a common carriage basis. Instead, in that instance, the carrier is providing exchange access to itself on a private carriage basis. Therefore an interexchange carrier would not be eligible to obtain a UNE exclusively to provide exchange access to itself in order to provide a retail interexchange service.

3. Implicit Support Flows

a. Background

154. In the *USTA* decision, the D.C. Circuit addressed the question of implicit support flows and their relationship to the Commission's decision making under section 251. The court concluded, among other things, that the Commission had not adequately explained its decision to adopt nationwide unbundling requirements in light of the implicit support flows found in telecommunications rates.[505] In this Part, we explain how our new impairment standard will address the concerns voiced by the D.C. Circuit and describe the nature and extent of existing implicit support flows.

155. In reaching the conclusion that the Commission's explanation was inadequate, the court expressed concerns about the Commission's approach to unbundling both in areas where the incumbent LEC's retail rates may exceed its costs (presumably referring to historic costs) and in areas where incumbent LEC retail rates may be below cost, although the court raised different concerns in each case. The court noted that "[c]ompetitors will presumably not be drawn to markets where customers are already charged below cost," although it recognized that competitors might be drawn to such areas if the new entrant could sell complementary services at prices high enough to offset the low local exchange rates.[506] While questioning entry into the higher cost markets, the court found the "gap in the Commission's reasoning . . . greatest" in requiring unbundling "in the other segments of the markets, where presumably ILECs must charge *above* cost . . . in order to offset their losses in the subsidized markets . . . ."[507] As explained below, however, the granular impairment analysis we adopt today, by focusing on the

[505] *USTA*, 290 F.3d at 422-23. In the *Iowa Utilities Board* decision, the Supreme Court had previously rejected BOC arguments concerning implicit support flows, noting that "[section] 254 requires that universal-service subsidies be phased out, so whatever possibility of arbitrage remains will be only temporary." *Iowa Utils. Bd.*, 525 U.S. at 393-94.

[506] *USTA*, 290 F.3d at 422. Thus, as the court suggested, even where the rate for an individual customer service offering may not cover the incumbent LECs' fully distributed historical book cost, that does not mean that such customers as a group are unprofitable or undesirable to serve.

[507] *Id.* (emphasis in original).

economic and operational viability of entry in different market segments, provides for a modification of the impairment standard that addresses these concerns, while supplying the detailed explanation the *USTA* court sought.

156. As the D.C. Circuit noted, the rates for telecommunications services historically have included implicit support flows between different classes of customers and geographic areas. In general, as the court recognized, these implicit support flows have tended to result in rates that are lower than they otherwise would be for residential and rural customers and rates that are higher than they otherwise would be for business and urban/suburban customers.[508] These implicit support flows still exist in many of the rates regulated by the state commissions, including those for local exchange service, intrastate exchange access, and intrastate toll rates. Such implicit support flows have also traditionally been found in the rates for interstate exchange access, and interstate toll service[509] subject to the Commission's regulatory jurisdiction.[510] Implicit support flows have traditionally been justified as supporting the universal availability of local exchange telephone service at affordable rates, and ensuring reasonable interexchange toll rates for customers in all parts of the country.

157. Despite relatively widespread agreement on such broad general statements concerning implicit support flows,[511] this area is more complex than it might initially appear. The existence of "below cost" residential local exchange service rates does not mean that such customers are "unprofitable" to serve. Determining whether a customer class is desirable to serve[512] requires a comparison of costs and all potential revenues for the class, which will

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[508] *Id.*

[509] These implicit support flows result, in large part from rate averaging between rural and suburban/urban areas and the recovery of certain non-traffic sensitive costs through traffic sensitive per minute rates, which over-recovers costs from higher volume users, often business customers. *See generally, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board On Universal Service*, CC Docket Nos. 96-262, 94-1, 99-249, 96-45, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249 and Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, 12971-72, para. 23 (2002) (*CALLS Order*) *aff'd in part, rev'd in part, and remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001). The court affirmed the *CALLS Order* in most respects, but remanded for further analysis and explanation the decisions to size the Interstate Access Support (IAS) mechanism at $650 million and to adopt the 6.5 % "X-factor."

[510] The original Communications Act of 1934 established a bifurcated system for the regulation of telecommunications, generally leaving the regulation of communications that originated and terminated within the same state to the state commissions, while this Commission regulated communications that originated and terminated in different states, except in the case of multi-state local exchange areas. *See* 47 U.S.C. §§ 152(b)(2), 221(b). The 1996 Act also gives various responsibilities concerning the implementation of the local competition provisions to this Commission. *Iowa Utils. Bd.*, 525 U.S. at 378. In addition, section 253 requires the Commission to preempt state and local requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a), (d).

[511] *But see* AT&T Willig Reply Decl. at paras. 50-56; WorldCom Reply at 26-27; WorldCom Reply, Declaration of Daniel Kelley (WorldCom Kelley Reply Decl.) at paras. 60-64.

[512] Even if the class as a whole is not desirable to serve, certain categories of customers within the larger class will typically be desirable based on their usage patterns or cost characteristics.

substantially exceed the local exchange service rate.[513] In addition, describing certain rates as being "above or below cost" itself involves complex questions concerning how costs should be defined. In the context of implicit support flows, describing a rate as "below cost" typically means that the rate is lower than the incumbent LEC's fully distributed historical cost of providing service.[514] This definition of "cost" does not necessarily provide a valid basis for comparison since in a fully competitive market, firms would typically price a service offering at long run incremental cost, which in the telecommunications industry may be considerably lower than fully distributed historical cost.[515] Moreover, telecommunications prices are not static, and will change over time in response to increased competition.[516]

158. Recognizing the potential effect of implicit support flows on the development of competition, the 1996 Act addresses this issue in section 254. This provision directs the Commission, after consultation with the Joint Board, to establish specific, predictable, and sufficient federal support mechanisms to preserve and advance universal service.[517] In particular, section 254(e) states that federal support mechanisms "should be explicit and sufficient to achieve the purposes of this section."[518] At the same time, section 254(b) establishes a list of principles that the Commission must use in establishing its policies for the preservation and advancement of universal service, including the principle that consumers in rural, insular, and high-cost areas should have access to telecommunications services at rates that are "reasonably comparable to rates charged for similar services in urban areas."[519] In fact, section 254(g) of the Act requires nationwide averaging of interstate toll rates.[520] In addition, section 254(f) provides

[513] Residential customers typically take a number of different services from their LEC in addition to local exchange service. These include vertical features, as well as federal and state access charges typically paid to the local exchange service provider unless the service is provided through resale, in which case the incumbent LEC would receive the access charge revenues. *See Local Competition Order*, 11 FCC Rcd at 15646-47, para. 292. The LEC may also receive explicit support payments, and provide the customer with long distance service and Internet access service.

[514] It is worth noting that, except for smaller incumbent LECs and some mid-sized incumbent LECs, both the Commission and state regulators have generally moved from traditional rate-base/rate-of-return regulation to the use of "price cap" or "incentive" type regulation for telecommunications rates, which does not involve a direct link between cost showings and rate levels. Under price cap or incentive type regulation, for example, a regulated carrier's rates may be frozen for a period of time or subject to periodic adjustments that reflect factors such as the rate of inflation, historic productivity gains and certain cost changes deemed to be beyond the carrier's control.

[515] In addition, economic theory does not provide a clear answer to the question of how joint and common and fixed costs should be allocated for costing purposes. This is particularly problematic in the telecommunications industry due to the very high proportion of joint and common costs and fixed costs.

[516] *See, e.g.*, AT&T Willig Reply Decl. at para. 60.

[517] 47 U.S.C. § 254.

[518] *Id.* § 254(e).

[519] *Id.* § 254(b)(3).

[520] *Id.* § 254(g); 47 C.F.R. § 64.1801.

that the "[s]tate[s] may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service."[521]

159. The extent of interstate implicit support flows has decreased substantially since passage of the 1996 Act. In response to section 254, the Commission has taken a number of major steps to remove implicit support flows from interstate access charges and develop federal universal service support mechanisms that are portable, *i.e.*, available not only to the incumbent local exchange carrier, but also to other qualifying local exchange carriers. These measures are intended to make universal service support compatible with the increasingly competitive marketplace for telecommunications.

160. In the *CALLS Order*, the Commission adopted a five-year transitional interstate access and universal service reform plan for price cap carriers.[522] The Commission's decision was intended to "[reform] our interstate access charge regime to identify implicit universal service support and to remove such implicit support from our interstate access charges, and . . . [establish] new universal service mechanisms."[523] At the same time, the *CALLS Order* "keeps rates affordable in high cost areas, by replacing the subsidies with explicit interstate access universal service support."[524] In particular, the order "creates an explicit interstate access universal service support mechanism . . . to replace the implicit support, and makes interstate access universal service support fully portable among eligible telecommunications carriers."[525] The Commission also reformed the interstate access charge regime and universal service support for rate-of-return carriers in the 2001 *MAG Order*.[526] The Commission has also taken steps to reform pre-existing universal service support mechanisms in light of section 254.[527]

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[521] 47 U.S.C. § 254(f). The Commission has not interpreted section 254 as requiring the elimination of implicit support flows contained in state rates.

[522] The *CALLS Order* reforms apply only to price cap carriers. The Commission previously reformed interstate access charges in the 1997 *Access Charge Reform Order. Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, 12 FCC Rcd 15982 (1997).

[523] *CALLS Order*, 15 FCC Rcd at 12973, para. 25.

[524] *Id.* at 12975, para. 32.

[525] *Id.*

[526] *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Second Report and Order and Further Notice of Proposed Rulemaking, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fifteenth Report and Order, *Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation*, CC Docket No. 98-77, Report and Order, *Prescribing the Authorized Rate of Return From Interstate Services of Local Exchange Carriers*, CC Docket No. 98-166, Report and Order, 16 FCC Rcd 19613 (2001), *recon. pending* (*MAG Plan Order*).

[527] *See, e.g., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432 (1999) (*Ninth Report and Order*), *remanded sub nom. Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001). The *Ninth Report and Order* established a federal high-cost (continued....)

161. While it would be difficult, if not impossible, to accurately quantify the implicit support flows that remain in state rates, it appears that substantial intrastate support flows remain. This is true even though some states have engaged in rate "rebalancing" in light of the developing competitive environment.[528] At the same time, under the current system of federal/state jurisdiction for telecommunications regulation, the primary responsibility for regulating rates for intrastate telecommunications services[529] rests with the state commissions and is largely beyond our jurisdiction. Thus, under the system of dual federal/state jurisdiction, the states are generally responsible for adjusting the rates for intrastate services to promote consumer welfare and competition.

162. We also note that the vast majority of incumbent telephone companies may qualify for an exemption from, or modification or suspension of the Commission's unbundling requirements under section 251(c) with the result that the scope of the issues posed by implicit support is further limited. In particular, section 251(f)(1) contains an exemption from the Commission's unbundling requirements for rural telephone companies, which provides that

> [s]ubsection (c) of this section [the unbundling requirements] shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines . . . that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 . . . .[530]

Section 251(f)(2) also provides for suspensions and modifications of the requirements of section 251(b) and (c), which includes unbundling obligations, for "local exchange carrier[s] with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nation-wide" in certain circumstances.[531] Only the BOCs and Sprint exceed the 2 percent standard and thus would not be eligible to seek relief under the provisions of this section.[532]

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universal service support mechanism for non-rural carriers based on forward-looking economic costs. *Id.* at 20434-35, para. 2. The Commission is considering the Joint Board's recommendations regarding the remand of the *Ninth Report and Order*. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 17 FCC Rcd 20716 (2002).

[528] *See, e.g.*, Covad Reply at 52-53 (creation of intrastate universal service fund in California).

[529] As previously discussed, the 1996 Act gives the Commission a role in establishing the principles to be used in setting rates for UNEs and the discounts that apply to services when they are ordered for the purpose of resale. *See generally supra* note 510.

[530] 47 U.S.C. § 251(f)(1). Section 153(37) defines a rural telephone company. 47 U.S.C. § 153(37).

[531] *Id.* § 251(f)(2).

[532] *Trends in Telephone Service May 2002 Report* at 8-5.

b. Discussion

163. As explained below, by focusing on the economic and operational viability of entry in different market segments, our revised impairment standard addresses the issue of implicit support flows in a manner that is responsive to the concerns raised in the D.C. Circuit's *USTA* decision. At the same time, we conclude that the statute is best interpreted as giving the Commission considerable discretion to address the relationship between implicit support flows and our impairment analysis. In particular, the statute does not specify how the Commission is to address this issue, although it does contain a number of provisions that relate to the existence of implicit support flows. For example, Congress addressed issues related to implicit support flows in section 254 of the Act, but chose not to include language addressing how the existence of implicit support flows should factor into our impairment analysis. In addition, the statute allows the state commissions to limit the extent of unbundling, and thereby address possible issues arising from unbundling and implicit support flows, for all but the largest incumbent LECs. In particular, section 251(f)(1) and (2) provide for an exemption from section 251(c) requirements for rural carriers, and permit suspension or modification of the section 251(c) requirements for carriers serving, in the aggregate, less than two percent of the nation's access lines.[533] Moreover, section 271, which governs BOC in-region, interLATA entry, requires that they provide local loops, local switching and local transport on an unbundled basis throughout their service areas without regard to the existence of implicit support flows.[534] Thus, we conclude that the Act leaves the Commission with substantial discretion to address the appropriate relationship between implicit support flows and network unbundling within the confines of reasoned decision-making.

164. As explained below, the impairment standard adopted by the Commission and reflected in the more granular state commission proceedings mandated by this Order addresses the existence of implicit support flows in several ways. In general terms, the new impairment standard provides that a requesting carrier is deemed to be impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers that are likely to make entry into a market uneconomic.[535] In reaching this determination, our new impairment standard generally provides for consideration of any advantages as well as disadvantages that will be experienced by competitive LECs. Our

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[533] Thus, while the Commission has not interpreted the statute to require the development of comparable explicit support mechanisms at the state level, sections 251(f)(1) and (2) effectively permit the states to address the relationship between unbundling and implicit support flows in state rates by allowing the state commissions to limit unbundling for all but the largest incumbent LECs. This provision as well shows that Congress provided for mechanisms other than the impairment standard for the handling of implicit support flows.

[534] 47 U.S.C. § 271(c)(2)(B)(iv), (v), (vi). As discussed below, we interpret the "unbundling" requirement in section 271 to require that the network elements enumerated in the competitive checklist be priced based on the pricing standards in sections 201 and 202 of the Communications Act when they are not required to be unbundled pursuant to section 251(c)(3). *See infra* Part VIII.A.

[535] *See* Part V.B.1.d. *supra*.

impairment standard also provides for consideration of whether entry is economic by taking into account the potential revenue opportunities available.

165. In determining whether impairment exists, the Commission finds that actual marketplace evidence is the most persuasive and useful evidence, especially information concerning whether new entrants have deployed their own facilities or obtained wholesale facilities from entities other than the incumbent LEC for use in providing competitive retail services. While such market evidence will be given substantial weight, it is not necessarily conclusive or presumptive of a particular outcome without additional information. The Commission will also consider evidence of intermodal competition, when it is presented in the record.

166. Our impairment standard is unlikely to result in unwarranted unbundling in the case of areas and services for which local exchange rates generally exceed the incumbent LEC's costs. In fact, the services in urban areas and the enterprise services, which have tended to be priced "above" the incumbent LEC's "costs" have generally been the first areas to attract competitive entry,[536] probably due to the relatively high revenue opportunities available. Thus, these areas and services are the ones for which marketplace evidence of facilities-based competitive entry is most likely to warrant a finding of no impairment. Our impairment standard also generally provides for consideration of advantages experienced by new entrants as well as the barriers to entry that they encounter. Thus, our impairment standard will take into account circumstances in which the incumbent sets certain retail rates "above" its "cost," in order to provide support for other areas or services with retail rates that are "below cost," although we recognize that such rates are likely to change in response to competitive entry.[537] As a result, our impairment standard, which will be reflected in the granular analysis that the state commissions apply, will generally tend to reduce the likelihood of a finding of impairment in the case of areas and services for which prices are "above" the incumbent LEC's cost, and thus tend to reduce the extent of unbundling required in those areas.

167. Significantly, to the extent that incumbent LECs are required to make UNEs available pursuant to our impairment standard in the case of areas or services for which rates are "above cost," it will be based on an affirmative finding of impairment.[538] At the same time, such unbundling in "above cost" areas will tend to create pressure for the incumbent LECs[539] and state

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[536] *See supra* Part IV; *see also* Allegiance Reply at 23.

[537] *See supra* note 516.

[538] Retail rates that exceed the incumbent's cost of providing service will not necessarily result in facilities-based competitive entry. Rather, competitors are likely to base entry decisions on whether all potential revenues exceed the cost of entry, taking into consideration any countervailing advantages a new entrant may have. *See, e.g.*, WorldCom Reply at 27; AT&T Willig Reply Decl. at para. 61; WorldCom Kelley Reply Decl. at para. 64. In addition, even in such areas, new entrants may initially choose not to enter on a facilities-basis due to the very high fixed costs involved.

[539] Incumbent LECs will generally have flexibility to reduce rates appropriately in response to competition.

regulators to reduce or eliminate implicit support flows,[540] and establish rates that more closely reflect costs in conjunction with explicit support mechanisms. Insofar as unbundling in such areas brings about pressure for reductions in "above cost" rates, it should not be a matter for regulatory concern unless an incumbent LEC's overall earnings for telecommunications services fall below confiscatory levels.[541] This result is consistent with the Commission's long-standing support for movement toward cost-based rates and explicit support mechanisms.[542] It would also be in harmony with the general goals of section 254(b) for reform of interstate universal service support flows.

168. Furthermore, our impairment standard, which will be reflected in the granular analysis that the state commissions apply, should not produce unreasonable effects in areas and for services where local exchange rates are "below" the incumbent's "cost" of providing service. We recognize that "below cost" local exchange rates will tend to discourage competitive facilities-based entry, and that the absence of such entry will be considered as evidence of impairment. Our impairment standard, however, also provides for consideration of evidence concerning the full range of revenue opportunities available to carriers providing service over the relevant facilities. Thus, retail local exchange rates that are "below cost" do not mean that competitive entry will necessarily be uneconomic since a competitor will base entry decisions on a comparison of its costs and the full range of available revenue opportunities, not solely the local exchange rate.[543] Moreover, new entrants using alternative technologies may have lower

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[540] *See generally* Qwest Reply at 13 (state rate rebalancing); Sprint Reply at 9 n.11 (state rate rebalancing).

[541] *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968).

[542] The Commission has long supported federal rule changes designed to reduce implicit support flows and reflect cost causation principles in conjunction with explicit support mechanisms to protect universal service. The Commission began implementing such changes in the early and mid-1980s when it adopted measures to reform the jurisdictional separations process, which divides incumbent LEC costs between state and interstate operations, and adopted a system of interstate access charges which included a flat-rate end-user charge. For information concerning the initial steps in jurisdictional separations reform, see *Amendment of Part 67 of the Commission's Rules*, CC Docket No. 80-286, Decision and Order, 96 FCC 2d 781 (1984) *adopting* Second Recommended Decision and Order, 48 Fed. Reg. 46556 (Joint Board 1983), *aff'd sub nom. Rural Telephone Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988). For information concerning the Commission's access charge plan *see, e.g., MTS and WATS Market Structure*, CC Docket No. 78-72, Third Report and Order, 93 FCC 3d 241 (1983); *modified on recon.*, 97 FCC 2d 682, (1984), *modified on recon.* 97 FCC 2d 834 (1984), *aff'd in principal part and remanded in part sub nom, NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert denied*, 469 U.S. 1227 (1985); *MTS and WATS Market Structure* and *Amendment of Part 67 of the Commission's Rules*, CC Docket Nos. 78-72, 80-286, Decision and Order, 50 Fed. Reg. 939 (1985), *adopting* Recommended Decision and Order, 49 Fed. Reg. 48325 (Joint Board 1984); *MTS and WATS Market Structure* and *Amendment of Part 67 of the Commission's Rules*, CC Docket Nos. 78-72, 80-286, Report and Order, 2 FCC Rcd 2953 (1987), *adopting* Recommended Decision and Order, 2 FCC Rcd 2324 (1987).

[543] For example, a new entrant may offer a premium product or service package designed to be attractive to customers even when priced well above the incumbent LEC's rate for local exchange service.

costs than the incumbent LEC even when UNE rates are set at reasonable levels. Competitive entry under these circumstances would benefit consumers by increasing choice.[544]

169. Were our impairment standard to require unbundling for services and areas with "below cost" rates where actual competitive entry does not take place, little harm would result. As previously mentioned, the statute contains an exemption from the unbundling requirements for rural carriers and provides for state modification or suspension of the unbundling requirements for incumbent carriers serving, in the aggregate, less than two percent of the nation's access lines.[545] Thus, the state commissions are fully able to prevent any problems that they believe might result from unbundling requirements in these circumstances. Even without this statutory provision, little harm is likely to result in the event of unbundling requirements in situations where competitors do not actually enter the market.[546]

C. The "Necessary" Standard

170. Section 251(d)(2) requires the Commission, in making its unbundling determination, to consider whether "access to such network elements as are proprietary in nature is necessary."[547] In the *UNE Remand Order*, the Commission gave this interpretation of the "necessary" standard:

> We conclude that a proprietary network element is "necessary" within the meaning of section 251(d)(2)(A) if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer.[548]

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[544] *See, e.g.*, Allegiance Reply at 22.

[545] 47 U.S.C. § 251(f)(1), (2).

[546] Until a competitor requests UNEs, most of the smaller incumbent LECs need to do little other than stand ready to negotiate in good faith. The BOCs and the larger independent incumbent LECs will already have incurred the full cost of developing and providing UNEs where entry has taken place.

[547] 47 U.S.C. § 251(d)(2)(A).

[548] *UNE Remand Order*, 15 FCC Rcd at 3721, para. 44 (emphasis in original). The Commission also set forth a definition of "proprietary," which was not challenged in *USTA v. FCC* and is not at issue in this proceeding. *See id.* at 3716-20, paras. 32-40.

In the *UNE Remand Order*, the Commission only found two instances where an element could be considered proprietary and thus susceptible to unbundling under the necessary standard. The Commission found that Ameritech's routing tables in switches "may be proprietary," *Id.* at 3806, para. 247, but the Commission applied the "impair" standard rather than the "necessary" standard because those routing tables were unlikely to distinguish Ameritech's service from its competitors', and because withholding access to the routing tables would jeopardize (continued....)

171. In the *Triennial Review NPRM*, the Commission sought comment on whether to change the interpretation of "necessary" that was set forth in the *UNE Remand Order*.[549] We decline to change that interpretation.[550] The D.C. Circuit did not remand to us or vacate the "necessary" standard or instruct us to consider it further.[551] Particularly given how rarely the "necessary" standard is invoked as compared with the "impair" standard (indeed, in this Order we do not analyze any elements under the "necessary" standard), we find no reason to alter course.

D. "At a Minimum"

172. Section 251(d)(2) provides that "the Commission shall consider, *at a minimum*, whether . . . the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[552] In reviewing our interpretation of that phrase under the *UNE Remand Order*, the D.C. Circuit found no fault with the Commission's determination that this language allows the Commission to consider factors other than those specified in subparagraphs (A) and (B) of section 251(d)(2) when determining whether or not to require unbundling. With regard to the Commission's authority to "consider other elements," the court stated, "[w]e assume in favor of the Commission that that is so."[553] But the court cautioned restraint, recognizing that any use of factors in addition to impairment must be reasonably and responsibly tied to the statute. The court stated, "to the extent that the Commission orders access to UNEs in circumstances where there is little or no reason to think that its absence will genuinely impair competition . . . we believe it must point to something a bit more concrete than its belief in the beneficence of the widest unbundling possible."[554]

173. Consistent with the admonition of the courts that we not extend the unbundling obligations more widely than required to fulfill the purposes of the Act, we apply the phrase "at a minimum" in section 251(d)(2) with appropriate restraint. In this Order, we have not required the unbundling of any network element in the absence of impairment. Although we continue to

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competition. *Id.* at 3807, paras. 250-51. The Commission also found that services created in the AIN platform and architecture were "proprietary," but found that they were not "necessary," and therefore did not unbundle them. *See id.* at 3875, para. 402, 3881-82, paras. 418-20.

[549] *See generally Triennial Review NPRM*, 16 FCC Rcd at 22790-91, paras. 18, 21.

[550] *See* ALTS *et al.* Comments at 26-27; Eschelon Comments at 6-7; NuVox Comments at 21.

[551] *See generally USTA*, 290 F.3d at 415.

[552] 47 U.S.C. § 251(d)(2) (emphasis added).

[553] *USTA*, 290 F.3d at 425. The court's discussion was premised on the Commission's determination in the *UNE Remand Order* that additional factors could be used to assess unbundling, whether as a further limitation on unbundling despite the presence of impairment, or as a justification of unbundling in the absence of evident impairment. *UNE Remand Order*, 15 FCC Rcd at 3745, para. 101.

[554] *Id.*